UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	Case No. 95-48268
MTG, Inc.,	Chapter 7
Debtor.	Judge Thomas J. Tucker
_____/	
GUY C. VINING,	
Plaintiff,	
v.	Adv. Pro. No. 03-4950
COMERICA BANK, et al.,	
Defendants.	
_____/	

MEMORANDUM AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT REGARDING "CHARLES J. TAUNT AND CHARLES J. TAUNT & ASSOCIATES, P.C.'S MOTION TO WITHDRAW REFERENCE AS TO ANY REMAINING JURY TRIABLE ISSUES" (DOCKET # 253)

On October 28, 2008, Defendants Charles J. Taunt and Charles J. Taunt & Associates, P.C. (collectively "the Taunt Defendants") filed a document entitled "Charles J. Taunt and Charles J. Taunt & Associates, P.C. Motion to Withdraw Reference as to Any Remaining Jury Triable Issues" (Docket # 253). The motion asks the United States District Court to "withdraw any reference to the United States Bankruptcy Court as to any remaining jury triable issues in this case." (*Id.* at 1).

By its nature, of course, the Taunt Defendants' motion to withdraw the reference must be decided by a judge of the United States District Court, not by the bankruptcy judge. *See* 28 U.S.C. § 157(d); Fed.R.Bankr.P. 5011(a); E.D. Mich. L.R. 83.50(b). The undersigned

bankruptcy judge offers the following observations and recommendation, however, for whatever assistance or use they may be to the district judge who is assigned to decide the motion.

The Taunt Defendants' motion to withdraw the reference is premised on Taunt's failure/refusal to expressly consent to the bankruptcy court conducting any jury trial in this adversary proceeding. Unless all parties to the adversary proceeding consent to the bankruptcy judge conducting a jury trial, the bankruptcy judge cannot conduct a jury trial; any such trial must be conducted by the district court. *See* 28 U.S.C. § 157(e); *Rafoth v. Nat'l Union Fire Ins. Co. (In re Baker & Getty Fin. Servs., Inc.)*, 954 F.2d 1169, 1172-73 (6th Cir. 1992).

The Court notes initially that it remains to be determined whether there will be any jury trial in this adversary proceeding at all. The only jury demand filed in this case was filed by the Plaintiff Guy C. Vining, Trustee, in the Complaint (Docket # 1). On October 28, 2008, the Comerica Defendants (*i.e.*, Defendants Comerica Bank; Ronald Marcinelli; Steven Lyons; Paul Dufault and Michael A. Collins) filed a timely motion to strike Plaintiff's jury demand, arguing that there is no right to jury trial on any of Plaintiff's claims. (Docket # 248). On October 27, 2008, the Taunt Defendants obtained an Order extending their deadline, through November 4, 2008, to file a motion to strike Plaintiff's jury demand. (Docket # 244).

Moreover, for the reasons explained below, all parties in this adversary proceeding either have consented to the bankruptcy judge conducting any jury trial in this adversary proceeding, or, as is the case with the Taunt Defendants, are *deemed* to so consent under the Bankruptcy Court's Local Rule 9015-1.

First, the Plaintiff Guy C. Vining, Trustee; the Comerica Defendants; and Defendant Miller Canfield (which has since settled out of the case) all consented on the record to the

bankruptcy judge conducting any jury trial, during a scheduling conference held on June 25, 2007. (*See* Adversary Proceeding Scheduling Order, (Docket # 71), at 2-3, item ## 13, 3).

Second, the other Defendants, including the Taunt Defendants, are *deemed* to consent to the bankruptcy judge conducting any jury trial, under L.B.R. 9015-1 (E.D. Mich.). The version of L.B.R. 9015-1 (E.D. Mich.) that was in effect when Plaintiff filed this case, and until May 5, 2008, provided:

> A party who demands a jury trial shall be deemed to have consented to the bankruptcy judge conducting the jury trial unless, concurrently with the filing of the jury demand, the demanding party files a motion to withdraw the reference. **The other party or parties shall have 10 days after the service of a jury demand to file a motion to withdraw the reference; otherwise the non-demanding party shall be deemed to have consented to a jury trial conducted by the bankruptcy judge.**

(emphasis added). This Local Rule was amended, effective May 5, 2008. It now states, in pertinent part:

> **(a) In a Contested Matter or Adversary Proceeding Initiated in Bankruptcy Court.** A party who demands a jury trial in a contested matter or adversary proceeding initiated in the bankruptcy court shall be deemed to have consented to the bankruptcy judge conducting the jury trial unless, concurrently with the filing of the jury demand, the party files a motion to withdraw the reference. **Any other party shall have until 10 days after the later of (a) the service of a jury demand, or (b) the deadline to file an answer or other responsive pleading, to file a motion to withdraw the reference; otherwise, that party shall be deemed to have consented to a jury trial conducted by the bankruptcy judge.**

(emphasis added).

The only party in this adversary proceeding who demanded a jury is the Plaintiff, Guy C. Vining, Trustee. On August 18, 2003, Plaintiff filed his complaint, initiating this adversary

proceeding, and the Complaint included a jury demand. (Docket # 1). The Taunt Defendants were served with the Complaint, jury demand, and a summons on August 22, 2003. (Docket ## 2, 4). An answer to the complaint by these defendants was due by September 17, 2003 (30 days after issuance of the summons, which was issued on August 18, 2003). There is no indication in the record that the Taunt Defendants were granted an extension of time to answer the complaint, although two other defendants (Miller Canfield and Plunkett & Cooney, P.C.) were granted extensions of time to file an answer until October 31, 2003. The Taunt Defendants filed their answer to the complaint on October 31, 2003. (Docket # 33).

Under both the pre-amendment and the post-amendment version of this Court's Local Rule 9015-1, the Taunt Defendants are deemed to have consented to the bankruptcy judge conducting any jury trial. Ten days after service of Plaintiff's jury demand was September 1, 2003. Assuming that the Taunt Defendants were granted an extension of time to file an answer or other pleading responsive to the complaint until October 31, 2003, like two of the other defendants, ten days after their deadline to file an answer or other responsive pleading was November 10, 2003. The Taunt Defendants did not file any motion to withdraw the reference until almost five years later, on October 28, 2008.

For these reasons the Court concludes, and recommends that the district court conclude, that the Taunt Defendants are deemed to consent to the bankruptcy judge conducting any jury trial in this adversary proceeding.

The same conclusion and recommendation applies to the two other defendants in this case who did not otherwise consent to the bankruptcy court conducting any jury trial. These other defendants are American Casualty Company of Reading, PA and Plunkett & Cooney, P.C. These

defendants filed their answers to the Plaintiff's complaint on October 17, 2003 (Docket # 21) and October 31, 2003 (Docket # 36), respectively. Neither of these defendants has filed a motion to withdraw the reference, and the deadline in L.B.R. 9015-1 is long expired for them as well.

Signed on October 31, 2008

/s/ Thomas J. Tucker
Thomas J. Tucker
United States Bankruptcy Judge